RECENT DECISIONS.

BILLS AND NOTES—FAILURE OF CONSIDERATION—GENERAL ISSUE—EVIDENCE. Plaintiff sold defendant a machine, warranting it. In payment defendant gave his promissory note. *Held*, in an action on the note that evidence of total failure of consideration due to a breach of the warranty was admissible under the general issue. *Keystone Mf'g Co.* v. *Forsythe*, 85 *N. W.* 262 (Mich., Feb. 1901).

The court treats the breach of warranty as a breach of condition causing total want of consideration. Evidence of want of consideration was, before the Hilary rules, admissible at common law under the general issue. *Chitty on Bills of Exchange*, 8th Am. Ed., page 604; *McCreary* v. *Jaggers*, 3 McCord, 473 (S. C. 1826). In Michigan the general issue is as broad as at common law. *Taff* v. *Hosmer*, 14 Mich. 309 (1866).

But where there is only a partial failure of consideration, unliquidated in amount, as in the case of goods sold on a warranty subsequently broken, evidence thereof would be no defence to an action on the note. *Fickey* v. *Larme*, 6 M. & W. 278 (Ex. 1840). The principal case seems to be within this rule. To-day, in this country, such evidence would be a *pro tanto* mitigation of the damages. *McKnight* v. *Devlin*, 52 N. Y. 402 (1873); *Stacy* v. *Kemp*, 97 Mass. 166 (1867).

CARRIERS—LOSS OF BAGGAGE—LIABILITY OF COMPANY. Without intending to become, and without becoming, a passenger, defendant bought a ticket and checked his trunk over defendant road. The night after its arrival the trunk was stolen from defendant's baggage-room. *Held*, defendant was a gratuitous bailee, liable only for gross negligence. *Marshall* v. *P. O. & N. Ry.*, 85 N. W. 242 (Mich. Feb., 1901).

To fix upon defendant liability as a carrier of baggage the owner must stand in the relation of a passenger to him. *Smith* v. *Ry.*, 44 N. H. 330 (1862); *Ry.* v. *Wimberley*, 75 Ga. 316 (1885); *State* v. *Knight*, 3 Am. & Eng. R. Cas. 374 (N. Y., 1895).

If the carrier accept by accident or mistake that which would be baggage were it accompanied by the owner as passenger, without its being so accompanied, the carrier will not be responsible for it as baggage, *The Elvira Harbeck*, 2 Blatch. 336 (U. S. C. C., 1851); *Griffan* v. *Ry. Co.*, 67 Me. 231 (1877).

Nor shall a carrier be held liable as a carrier of freight for that which he has accepted for carriage as baggage. *Collins* v. *Ry Co.*, 10 Cush. 506 (Mass., 1852); *Beers* v. *Ry. Co.*, 34 At., 541 (Conn., 1896).

Fairfax v. *Ry. Co.*, 73 N. Y. 167 (1878), presents a different question. There the carrier accepted trunks, knowing that the owner was not a passenger. He was held liable as a warehouseman.

CONSTITUTIONAL LAW—TAXATION OF NON-RESIDENT MORTGAGEES. *Held*, a statute of Maryland fixing the *situs* of mortgages at the point where the land is located and imposing a tax on them, including those held by non-residents, does not contravene the Fourteenth Amendment. *Allen* v. *Bank of Camden*, 48 Atlantic 78 (Md., 1901).

The decision is perfectly sound. The U. S. Supreme Court has decided that where the tax is not levied upon the debt secured by the mortgage but upon the mortgage interest in the land, whether that interest be regarded as real estate or personal property, the tax is valid against non-residents. *Savings Society* v. *Multnomah County*, 169 U. S., 421 (1897); *Bristol* v. *Washington County*, 177 U. S., 139 (1899). The case is interesting as showing again that great injustice may result from double taxation by competing jurisdictions.

CONTRACTS—RESTRAINT OF TRADE. *Held*, a covenant not to engage in a certain business, void as in restraint of trade, will not invalidate the contract of which it is a part, if such contract has other good consideration. *Rosenbaum* v. *U. S. Credit System Co.*, 48 Atl. 237 (Ct. of Errors, N. J.; Jan. 1901).

With the single exception of *Fishell* v. *Gray*, 60 N. J. L. 5 (1897), no case seems to approach the subject from exactly this point of view. In modern times the law as to restraints on trade has grown much more lenient, and it is usual to treat such contracts as divisible wherever possible, and enforce the reasonable part of the restraint. But in the principal case there is nothing said as to divisibility, and the plaintiff's covenant is regarded as merely insufficient, *i. e.*, no consideration, as distinguished from such illegal consideration as would taint the whole transaction. This seems sensible and in accordance with the better modern opinion that, in the absence of statutes, such contracts are only unenforceable, not criminal or actionable. *Mogul S. S. Co.* v. *MacGregor*, 1892 App. Cases 25 (H. of L.); but cf. *Jackson* v. *Stanfield*, 36 N. E. 345 (Ind., 1894). On the facts the following cases appear to accord with the principal case: *Green* v. *Price*, 13 M. & W. 695 (1845); *Dean* v. *Emerson*, 102 Mass. 480 (1869); *Oregon Nav. Co.* v. *Winsor*, 20 Wall 64 (1873); *West. Union Tel. Co.* v. *R. R. Co.*, 11 Fed. 1 (1882). *Contra: Bank* v. *King*, 44 N. Y. 87 (1870); *Arnot* v. *Coal Co.*, 68 N. Y. 558 (1877); *Oil Co.* v. *Nunnemaker*, 142 Ind. 560 (1895). See also *Eddy on Combinations* (1901), § 603*n*, 712, 713, 745.

CONTRACTS—RESTRAINT OF TRADE. *Held*, a contract not to engage in a particular business, though unaccompanied by the sale of any business, stock or plant, is not void as in restraint of trade. *Wood* v. *Whitehead Bros.*, 59 N. E. 357 (N. Y., Feb. 5, 1901).

In effect the plaintiff's agreement to discontinue his business was a sale of the good-will to the defendant. Such a contract was held good in *Brett* v. *Ebel*, 29 App. Div. 256 (1898), cited with approval in the case at bar. Apparently there is no other case in point. See *Eddy on Combinations* (1901), § 771. On principle it would appear unexceptionable.

DOMESTIC RELATIONS—WIFE'S SERVICES AND EARNINGS—EFFECT OF MODERN STATUTES. Under an agreement between plaintiff and defendant's testator, plaintiff's wife, while continuing to live with her husband, rendered services to the testator for the value of which this suit is brought. Laws of 1884, Chap. 381, provide that married women may contract as if unmarried. *Held*, the action was properly brought in the husband's name. *Holcomb* v. *Harris*, 166 N. Y. 257 (Mar., 1901).

In *Birkbeck* v. *Ackroyd*, 74 N. Y. 356 (1878), the statute of 1860, conferring upon married women the right to create a separate estate, was held not to interfere with the right of the husband to his wife's earnings in the absence of an election on the woman's part to labor for her own estate. And in *Porter* v. *Dunn*, 131 N. Y. 314 (1892), notwithstanding the liberal provisions of the Married Women's Act of 1884, a husband recovered money earned by his wife under a contract made by her with the defendant. The Court held that the statute had no effect on the common law right of a husband to the services and earnings of his wife where they are not rendered or received expressly upon her separate account. These decisions are the result of a strict construction of statutes modifying the common law.

EQUITY—CONCURRENT JURISDICTION—COMPLICATED ACCOUNTS. After an account, involving over eighty-eight disputed items and much technical evidence had, in an action at law, been sent to a referee, plaintiff filed a bill to take his complaint into equity and enjoin the suit at law. *Held*, equity has concurrent jurisdiction and may enjoin an action at law where the mutual accounts are complicated and the evidence is so technical that it is practically impossible for a jury to reach any just conclusion. *Inhabitants of Cranford Tp.* v. *Watters*, 48 Atl. 316 (N. J., Feb., 1901).

Action by courts of equity in this class of cases is discretionary, and

no relief will be given unless a state of facts warranting interference with the trial at law is confessed in the answer or apparent on the state of the record. *Railway Co.* v. *Nixon*, 1 H. L. C. 111 (Eng., 1847); *Railway Co.* v. *Brogden*, 3 Macn. & G. 8 (Eng., 1850); *Crane* v. *Ely*, 37 N. J. Eq. 564 (1883). As the jurisdiction does not depend on the absence of a legal remedy, but chiefly on the fact that a jury has no means of reaching a just conclusion, *Crown Coal Co.* v. *Thomas*, 177 Ill. 534 (1899), in those States where, by statute, an account may be taken from the jury and sent to a referee, who may order a production of the books, equity will not interfere if the case does not involve a fiduciary relation. *Badger* v. *MacNamara*, 123 Mass. 117 (1877); *Marvin* v, *Brooks*, 94 N. Y. 71 (1883); *Ullman* v. *N. Y. Life Insurance Co.*, 109 N. Y. 421 (1888); *Wisner* v. *Fruit Jar Co.*, 25 App. Div. 362 (N. Y., 1898). The case is of interest in showing the difference of procedure in "code" States and those retaining the old equity rules.

EVIDENCE—EXPERT TESTIMONY. Action for injury to a workman by falling dirt. *Held*, an experienced civil engineer may answer a question as to a safe and proper method of shoring up an excavation made at the side of a high chimney. *Finn* v. *Cassidy*, 59 N. E. 311 (N. Y. 1901).

This ruling follows the trend of decisions on the admissibility of expert evidence and represents the correct principle. 1. *Greenleaf Evidence* (16th ed.), p. 441. This would follow from the admission of expert evidence in the following cases: that a house was built in a workmanlike manner, *Pullman* v. *Corning*, 9 N. Y. 93 (1853); proper speed for a tugboat, *Baird* v. *Daly*, 68 N. Y. 547 (1877); by a cabinet maker that work was a good job and well done, *Ward* v. *Kilpatrick*, 85 N.Y. 414 (1881); that the use of machinery weakened the walls, *Turner* v. *Hoar*, 21 S. W. 737 (Mo., 1893); that a staging erected for the purpose of piling wood was safely constructed, *Prendible* v. *Connecticut Mfg. Co.*, 35 N. E. 675 (Mass., 1893). This question has been discussed by O'BRIEN, J., in 1. COLUMBIA LAW REVIEW 180. GRAY, J., who dissents in the principal case, does not dispute the truth of the principle laid down in the prevailing opinion; he believes the danger of the place was not connected with the underpinning of the chimney and therefore its construction had nothing to do with the issue.

EVIDENCE—LARCENY—RES GESTÆ. Suspicion of larceny fell on the accused, and his house was searched by a constable soon after the commission of the crime; upon discovery of goods the accused stated that they had been brought and left with him by a third party. *Held*, such statements were admissible as part of the *res gestæ*. *State* v. *Gillespie*, 63 Pac. 742 (Kas., 1901).

Such evidence is almost universally conceded to be admissible. In general the possession of stolen goods is evidence of guilt upon which a jury might find a verdict. *Commonwealth* v. *Randall*, 119 Mass. 107 (1875); *People* v. *Stover*, 56 N.Y. 315 (1874); 1. *Greenleaf Evidence*, § 42. As it is competent for the defendant to prove acts by which the goods came into his possession, it should be competent for him to prove all pertinent statements made at the time of the discovery, spontaneously and before he had time to concoct a story. Many courts have held this evidence admissible within the *res gestæ* rule either for or against the accused. 2. *Bishop Criminal Procedure* (3d ed.) §§ 743, 745, 746, and cases there cited; *People* v. *Dowling*, 84 N. Y. 478 (1881); *Henderson* v. *The State*, 70 Ala. 23 (1881); *Territory* v. *Mitchell*, 54 Pac. 782 (Okl., 1898).

INSOLVENCY—PREFERENCES—ESTATE BY ENTIRETIES. A, knowing he was insolvent, and in order to put his property out of the reach of his creditors, conveyed it to X, without consideration, who reconveyed to A and his wife, "husband and wife, as joint tenants." A's wife had no knowledge of his insolvency, and believed that the object of the transfer was to secure a loan she had made A from her own antenuptial earnings. *Held*, this was not fraudulent against creditors, and the estate by

entireties must be protected. *Ullmann et al.* v. *Thomas et al.*, 85 N. W. 245 (Mich., Feb. 1901).

Since the deed expressly created a joint tenancy, it may well be doubted whether this was properly treated as an estate by entireties, incapable of partition. *Joos* v. *Fey*, 129 N. Y. 17 (1891); *Miner* v. *Brown*, 133 N. Y. 308 (1892); 4 *Kent Com.* 362, 364; *N. Y. Real Prop. Law*, § 56; *Howell's Mich Gen. St.*, § 559. But a transfer, made by an insolvent as security for a subsisting debt, to one who has no knowledge of a contemplated general assignment, is valid against creditors. *Manning* v. *Beck* 129 N. Y. 1, 10 (1891). And, unless a general assignment has been made or is contemplated, there is no limitation upon the right to prefer one creditor over the others. *Bishop*, *Insolvency*, §§ 172–4, 177 (1895). Adopting, then, this view of the case, the present is but an aggravated instance of the injustice which the well-settled rule permits.

INSURANCE—BENEFIT ASSESSMENT CORPORATION—CHANGE OF BENEFICIARY. A member of a society, whose certificate was made payable to his wife, wrote the collector to have a new one issued to his mother instead, but died before the request was communicated to the society. No peculiar form having been prescribed by the society's by-laws to govern the change of beneficiary, it was *held* that effect must be given to the member's intention, though the wife's certificate was outstanding, and the Insurance Law only provided that such change might be made *upon the consent of the society*. *Fink* v. *D., L. & W. Mutual Aid Society*, 57 App. Div. 507 (N. Y., Jan. 1901).

While the question here raised was not concluded by the case of *Luhrs* v. *Luhrs*, 123 N. Y. 367 (1890), the present holding is certainly in line with the reasoning in that decision; and the Insurance Law on the point is a re-enactment merely of the Laws of 1883, Ch. 175, § 18. The numerous decisions cited are unsatisfactory, because the by-laws of each society have respectively furnished the test, but they serve to make clear at least the desire of the courts to effectuate the member's intention. *Richards*, *Insurance*, 198. Yet the present court has gone very far, in holding the change properly made, when, as LAUGHLIN, J., says (dissenting), at the time of the member's death the old certificate had not been revoked, nor superseded by a new one, and the society had not consented to the change.

INSURANCE—INTERPRETATION OF STATUTE EXEMPTING FROM EXECUTION. Defendant had received money as the beneficiary of a fraternal society, and had loaned it to his son, taking a bond and mortgage therefor. Upon these the plaintiff levied under an attachment. The defendant claimed exemption under p. 228 of the Insurance Law (Chap. 690, Laws of 1892). *Held*, the statute exempting from execution "all money or other benefit * * * to be paid" did not cover an amount already paid to the defendant. *Bull* v. *Case*, 59 N. E. 301 (N. Y., Feb., 1901). This interpretation of the statute is in line with what seems to have been the legislative intent. Chapter 175 of the Laws of 1883 provided that "money to be paid" should be exempt. *Bolt* v. *Kehoe*, 30 Hun, 619 (1883) *held* that money actually received by a widow was not exempt from creditors' claims. Then Chap. 116, Laws of 1884, was passed, and Sec. 116 extended the exemption to cover such a case by providing that such beneficiary fund "paid to the widow" should be exempt. The sections in point of the laws of 1889 and 1892 reaffirmed the corresponding section of the law of 1883 with certain additions, again using the words "to be paid," under which *Bolt* v. *Kehoe*, *supra*, was decided. When, therefore, the Legislature wished to extend the rule of that case, it did so explicitly, by using the form "paid." *Clark* v. *Lynch*, 31 N. Y. Supp. 1038 (1894) was decided on the authority of the statute of 1884, a widow being the party, and is not necessarily in conflict with the principal case.

INSURANCE—VENDOR A TRUSTEE OF INSURANCE MONEY FOR VENDEE—CHANGE OF INTEREST UNDER ALIENATION CLAUSE OF STANDARD POLICY. Owner of insured real estate contracted to sell, but premises were

destroyed by fire before the time fixed for completion. Full purchase price was subsequently paid, without prejudice to the rights of vendor or vendee to insurance, the vendor remaining in possession throughout. Certain insurance companies were about to pay vendor; others raised the point that under the clause, "if any change take place in the interest, title or possession of the insured," etc., the policy was forfeited. Bill in Equity filed by vendee. *Held*, first, there had been a forfeiture; secondly, as to companies waiving forfeiture, that vendor was a trustee of insurance money for vendee. *Skinner* v. *Houghton*, 48 Atl. 85 (Maryland, Dec. 1900). SEE NOTES.

JUDGMENTS—MORTGAGES—PRIORITIES. *Held*, a judgment creditor, A, who, upon issuing execution against the lands of his debtor, directed the sheriff to return it without levying, and upon it instituted supplemental proceedings to reach assets not leviable, was postponed, not only to a subsequent judgment creditor, C, who did levy, but also to an intervening mortgagee, B, who, if C had not levied, could not have taken advantage of A's laches, but who, notwithstanding C's action, still remained prior to C. *Andrus* v. *Burke*, 48 Atl. 228 (N. J. Eq., Feb. 1901).

The court based its decision on *Clement* v. *Kaighn*, 15 N. J. Eq. (1862) and *Hoag* v. *Sayre*, 33 N. J. Eq. 552 (1881), which it considered binding, but frankly admitted that it knew of no principle to support it. The court assumed that if C had not issued execution and levied, B should still remain subsequent to A. Upon this assumption the conclusion arrived at does indeed present a "legal puzzle * * * insoluble on any known principles." But it is submitted that this assumption is wrong, and that the conclusion is right on principle. For, as a matter of law and of justice, A's laches should inure to the benefit of B as well as of C. That the Legislature failed to provide for this is not a valid reason why the court should refuse to bring about the desired result in a case like the present, where otherwise B might suffer from the priority which, apparently, through legislative inadvertence, was given to C alone. Where this position is not adopted, the courts are driven to other expedients to support the rights of the mortgagee. *Hunt* v. *Bowman*, 63 Pac. 747 (Kan., 1901).

LICENSE FEES—WHAT CONSTITUTES A PUBLIC HACKMAN. *Held*, a non-resident liveryman who furnished cab service to the patrons of a steamship company, under contract with the company, was not a public hackman within the meaning of a municipal ordinance and not required to secure a license. *City of New York* v. *Hexamer*, N. Y. Law Jour., Mch. 25, 1901.

It is well settled that when a charge exceeds the cost of issuing the license and of regulating the business, it is a tax and not a fee. In this case regulation was unnecessary, because defendant kept no stands and his services were offered to a limited class under contract. With regard to defendant, the charge was therefore a tax, and as there was no intention that this municipal power should be used to raise revenue, the defendant was clearly not liable. *People* v. *Jarvis*, 19 App. Div. 466 (1897).

QUASI-CONTRACT—PLAINTIFF IN DEFAULT UNDER CONTRACT. *Held*, a plaintiff in default under a building contract could recover the actual value to the defendant of what has been done, and plaintiff must prove the amount of defendant's enrichment. *Gillis* v. *Cobe*, 59 N. E. 455 (Mass., 1901), 3 dissenting.

In *Hayward* v. *Leonard*, 7 Pick. 181 (1828), it was *held*, upon similar facts, that "what the house was worth to the defendant" was an erroneous basis of recovery, and the true rule was "to deduct so much from the contract price, as the house was worth less on account of these deviations." In *Atkins* v. *Barnstable*, 97 Mass. 428 (1867), a *quantum meruit* not to exceed the contract price, less defendant's damage, was the basis of recovery. The difference between the two rules has been pointed out. *Keener's Quasi-Contracts*, 313 N. 2. The prin-

cipal case held that there was no question of recoupment and eliminated the contract price, yet *Hayward* v. *Leonard* was approved.

In a still more recent case in Mass. it was *held* that while the true basis was defendant's actual enrichment, yet in many cases this could be ascertained by deducting defendant's damages from the contract price, yet *Gillis* v. *Cobe* was approved. *Norwood* v. *Lathrop*, 59 N. E. 650 (Mass., 1901). There is a difference between these three rules, though they seem to have been confused. It is conceived that the rule in *Atkins* v. *Barnstable* is the most reasonable, and it has been adopted elsewhere. *Eyerman* v. *Cemetery Ass'n.*, 61 Mo. 489 (1876); *Miller* v. *Gillick*, 66 Mo. App. 500 (1896).

QUASI-CONTRACT—PLAINTIFF IN DEFAULT UNDER CONTRACT. Where a plaintiff was wilfully and inexcusably in default under a contract for work and services at a *per diem* rate, *held* he could recover for the work actually done according to the contract price, less any damage to the defendant. *Asher* v. *Tomlinson*, 60 S. W. 714 (Ky. 1901).

So far as appears from the report of this case, part of plaintiff's labor was bestowed on his own property, which he refused to transfer to defendant when the contract was abandoned, and on this ground he should not have recovered for the entire work done. *Dowling* v. *McKenney*, 124 Mass. 478 (1878). Assuming plaintiff's right to recover, the true measure of recovery was not adopted. The most reasonable basis is a *quantum meruit*, not to exceed the contract price, less defendant's damage from the breach. *Atkins* v. *Barnstable*, 97 Mass. 428 (1867). There is, however, good authority for the rule in the principal case. *Pinches* v. *Church*, 55 Conn. 183 (1887); *Ætna Works* v. *Kossuth County*, 79 Iowa 40 (1890). The objection to this rule is that it adheres too closely to the contract, when in fact the plaintiff, having abandoned the contract, is seeking to recover the amount of the defendant's actual enrichment. The contract price should, therefore, be eliminated, except where by *quantum meruit* plaintiff would profit by his breach, and in that case the contract price should be the limit of recovery.

REAL PROPERTY—EASEMENTS—NEW USE OF HIGHWAY. A telephone company dug a trench below the surface of a city street for a conduit for telephone wires, to be used by the city, public and others for inter-communication. *Held*, that this is not such a new use of the highway as will entitle the abutting owner of the fee of the highway to compensation. *Coburn* v. *New Telephone Co.*, 59 N. E. 324 (Ind., Feb., 1901).

The Court follows *Magee* v. *Overshimer*, 150 Ind. 127 (Mar., 1898). It is well settled that a highway may be used, without compensation to the owner of the fee, for purposes which could not have been contemplated at the time of its dedication. *Eichels* v. *Evansville Street Railway Co.*, 78 Ind. 261 (1881); *Lockhart* v. *Craig Street Railway Co.*, 139 Penn. 419 (1891); provided such new use tends to facilitate the use of the land by the public for highway purposes.

As to what are proper highway uses, the decisions are numerous and not altogether harmonious. In general the courts tend to favor such new uses as are beneficial either to the residents, as drains, *Stowdinger* v. *Newark*, 28 N. J. Eq. 137 (1877); gaspipes, *Commonwealth* v. *Lowell Gas Co.*, 12 Allen 75 (1866), etc.; or to the public passing and repassing, as street railways, *Craig* v. *Rochester Railroad Co.*, 39 N. Y. 404 (1868). But this doctrine is not extended to uses intended entirely or primarily to connected distant points, without special benefit to persons living upon or using the highway, as steam railroads, *Williams* v. *New York Central*, 16 N. Y. 97 (1857); or telegraph lines, *Dusenburys* v. *Mutual Telegraph Co.*, 11 Abb. New Cas. 440 (1882); but see *contra*, *Pierce* v. *Brew*, 136 Mass. 75 (1883). Telephones occupy the middle ground between these two classes of uses, and with regard to them the authorities are divided. The principal case, however, follows the general trend of the decisions.

REAL PROPERTY—EASEMENTS—HIGHWAYS AND RAILROADS. A railroad company owning its right of way in fee by conveyance from plaintiff's

grantor was compelled by a municipal ordinance to elevate its tracks. The plaintiff, an abutting owner, sued because of the consequent injury to his property. *Held*, he could not recover, a railroad not being a highway in the sense that an adjoining owner has easements of light and air therein. *Kotz* v. *Illinois Central R. R.*, 59 N, E. 240 (Ill., Dec., 1900).

In some jurisdictions abutting owners who have granted the fee of the highway to the public authorities are held to have certain rights of light and air therein as easements of necessity reserved by implication for the benefit of their adjoining property. And when the enjoyment of these rights is interfered with by a user of the highway inconsistent with the purpose of its dedication, the owners may obtain relief. *Story* v. *Elev. R. R. Co.*, 90 N. Y. 122 (1882).

This doctrine would seem to be equally applicable in the case of land granted for other public purposes. In *Barnett* v. *Johnson*, 15 N. J. Eq. 48 (1856), the proprietors of a public canal were restrained from cutting off light and air from adjoining property by the erection of buildings over the waterway. While the rule laid down in the principal case seems to be incorrect, the decision may perhaps be supported on the ground that the elevation of the tracks was a user of the right of way fairly within the terms of the original grant for railroad purposes.

REAL PROPERTY—TENANT'S POSSESSION AS NOTICE. F conveyed to B upon a secret trust for himself (F), leaving one C in possession as his tenant. *Held*, C's possession was notice to B's judgment creditors of F's equitable title. *A. R. Beck Lumber Co. et al.* v. *Rupp et al.*, 59 N. E. 429 (Ill., Dec. 1900).

This holding is amply justified by a series of Illinois cases cited, and which there is latterly a tendency to limit the doctrine of construction notice; *English & Scottish, etc. Co.*, v. *Brunton* (1892), 2 Q. B. 700, 708; *Carr* v. *Maltby*, 59 N. E. 291 (N. Y., 1901); 2 Wh. & Tu. Eq. Cas. 200 (7th ed., 1897); *Wade, Notice*, §§ 281, 297; and in some jurisdictions the doctrine never met with favor; as applied to a tenant's possession; *Emmons* v. *Murray*, 16 N. H. 385, 398 (1844); there is good authority in this country for the view of the principal case. *Crosland* v. *Mutual Saving Fund*, 121 Pa. St. 65, 83 (1888); *Phelan* v. *Brady*, 119 N. Y. 587 (1890); *Anderson* v. *Blood*, 152 N. Y. 285, 293 (1897); *Marden* v. *Dorthy*, 160 N. Y. 39, 52 (1899).

SALES—CONDITIONAL SALE—INNOCENT PURCHASER FOR VALUE—ESTOPPEL. Plaintiff made a sale of standing timber to a lumber company, reserving title until price was paid. Plaintiff knew that the company was engaged in manufacturing lumber for the purpose of resale, but took no precautions to see that it was kept apart and tacitly allowed the company to mark it with its own mark. Before payment was made the logs were sold to an innocent purchaser for value. *Held*, plaintiff estopped to assert his title. *Miss. River Logging Co.* v. *Miller*, 85 N. W. 193 (Wis., Jan. 1901).

The decision is correct. At common law conditional sales accompanied by delivery of possession to the vendee are valid, in the absence of fraud, against innocent purchasers as well as against the immediate parties. *Harkness* v. *Russell*, 118 U. S. 663 (1886). But where the vendor clothes the vendee with the *indicia* of ownership and expressly or impliedly gives him authority to resell, he will be estopped to assert his title against an innocent purchaser for value. *Fitzgerald* v. *Fuller*, 19 Hun 180 (1879); *Rogers* v. *Whitehouse*, 73 Me. 220 (1880); *Wagon Co.* v. *Carman*, 109 Ind. 31 (1886); *Spooner* v. *Cummings*, 151 Mass. 313 (1890); *Columbus Buggy Co.* v. *Turley*, 73 Miss. 529 (1896); *Mayer* v. *Catron*, 48 S. W. 255 (Tenn., 1898). The principal case falls within the latter doctrine. At present the common law view, that a conditional vendee's possession of the property does not confer upon him apparent authority to sell either as owner or agent of the owner, has been modified by statutes affording relief to creditors of the vendee and innocent purchasers from him for value. 1 *Stimson's Am. Statute Law*, §§ 4550–

4555. For the New York provisions see 3 *N. Y. R. S.* (9th ed.), Laws of 1884, Ch. 315, as amended.

SALES—INSTALMENT CONTRACT—EFFECT OF FAILURE TO PAY INSTALMENT OF PURCHASE PRICE. *Held*, a failure by the vendee to pay an instalment of the purchase-price, unless an intention to repudiate the contract be shown, is no ground for a refusal by the vendor to deliver subsequent instalments of goods, and he will be liable in damages for non-delivery. *Monarch Cycle Manufacturing Co.* v. *Royer Wheel Co.*, 105 F. R. 324 (C. C. A., Dec. 4, 1900). SEE NOTES.

STATUTE OF FRAUDS—SPECIFIC PERFORMANCE. *Held*, payment of purchase money or performance of services equivalent thereto was not sufficient part performance of an oral agreement for the sale of lands to take case out of § 4 of Statute of Frauds and allow decree for specific performance. PARKER, C. J., HAIGHT and LANDON, J.J., dissenting. *Russell* v. *Briggs*, 59 N. E. 303 (N. Y., Feb. 5, 1901).

The case is interesting for a remarkably strong dissent from established doctrine, and treated by the minority as a case of first impression. It is well settled that such a contract is void, though no price be paid in money (*Browne, Statute of Frauds*, § 271), and that payment even of the whole consideration is not sufficient part performance *Idem*, § 461. The point was considered in *Odell* v. *Montross*, 68 N. Y. 499 (1877), and *Cooley* v. *Lobdell*, 153 N. Y. 596 (1897), *semble accord*. The principal case is a square application of the general rule, on the usual ground that nothing is part performance which does not expose party performing it to fraud if the contract is not performed, and that here the parties may be restored to their original position by an action to recover the money. On principle, as pointed out by the minority, such fraud exists whenever the vendor is insolvent; and equity has gone even further in those cases where bare possession without payment by a vendee who is thus, if anything, benefited, has been held sufficient part performance. But the principal case is not necessarily authoritative where services are of such peculiar nature that it is impossible to estimate their pecuniary value to recipient. *Rhodes* v. *Rhodes*, 3 Sandf. Chan. 279 (N. Y., 1846); *Malins* v. *Brown*, 4 N. Y. 403 (1850); *Browne, Statutes of Frauds*, § 463.

STATUTES—REGULATION OF PUBLIC CALLINGS—TELEPHONES. Plaintiff was indebted to the defendant for telephone service. He refused to pay, alleging that the company was in his debt. *Held*, the company was justified in discontinuing the service, notwithstanding his claim against them. *Rushville Co-Op. Tel. Co.* v. *Irwin*, 59 N. E. 327, (Ind., Jan. 1901.)

The statute of Indiana imposes a penalty on telephone companies which refuse to supply all applicants without discrimination, provided such applicants comply with all reasonable regulations of the company. The defendant had a rule that any delinquent subscriber should be cut off. The case turns upon the reasonableness of this rule. It is well settled that corporations charged with a public duty may make and enforce such a regulation for the efficient prosecution of their business. *Western Union* v. *McGuire*, 104 Ind. 130 (1885) and cases there cited. But this right is limited to current indebtedness, and if waived cannot be exercised after service has been resumed, to enforce payment of the original debt. *Wood* v. *City of Auburn*, 87 Me. 287 (1895). The principal case extends this doctrine by affirming the right to cut off a subscriber who claims that the company is his debtor on another transaction, and distinguishes it from *Webster* v. *Telephone Co.*, 17 Neb. 126 (1885), where the subscriber refused to pay on the ground that the service had been imperfect.

TORTS—MENTAL SUFFERING—TELEGRAPH CASES. On account of the failure of defendant telegraph company to deliver a message announcing the death of a near relative, plaintiff was unable to be present at the funeral. He sued to recover damages in tort for distress of mind caused by the company's negligence. Demurrer to the complaint sustained. *Ferguson* v. *Western Union Tel. Co.*, 59 N. E. 416 (Ind., Feb. 1901).

This decision is worthy of note in that it marks a return to the common law doctrine of damages in a jurisdiction where since 1889 a different rule has been applied in cases of this kind. *Reese* v. *Tel. Co.*, 123 Ind. 294 (1889). The novel doctrine allowing damages for mental anguish caused by failure to deliver telegrams was first announced in Texas twenty years ago. *So Relle* v. *Western Union Co.*, 55 Tex. 308 (1881). And this ruling has been adopted in at least six other States, viz.: Alabama, North Carolina, Kentucky, Tennessee, Iowa and Indiana. At common law mental suffering is an element of damages only when connected with physical injury, but it would seem no more difficult to estimate damages when the distress of mind is unaccompanied by bodily hurt. That the rule introduced by judicial legislation is unwise as a matter of public policy is shown by the flood of speculative litigation in those States where the doctrine has found favor.

TRUSTS—BREACH OF TRUST—REMEDIES—RATIFICATION. A *cestui que trust* obtained judgment against his trustee for the proceeds of trust property wrongfully sold by him. This judgment remaining unsatisfied, the *cestui* sought to follow the property into the hands of purchasers. *Held*, that by taking judgment plaintiff ratified the sale and waived his right to pursue the vendees. *Carter* v. *Gibson*, 85 N. W. 45 (Neb., Jan. 1900).

A defrauded *cestui* may follow the trust property or may rely on a personal claim against the trustee at his option. *Murray* v. *Lylburn*, 2 Johns. Ch. 441 (N. Y., 1817). But the right of election must be exercised within a reasonable time after knowledge of the breach of trust. *Breit* v. *Yeaton*, 101 Ill. 242 (1882). The right to claim the property and the right to hold the trustee being alternative and not concurrent, the *cestui* after having taken judgment cannot be allowed to insist on repugnant rights. *Hodges* v. *Bullock*, 15 R. I. 592 (1887).

WILLS—CONSTRUCTION—PRECATORY TRUSTS. A will drawn by testator, a layman, left all his property to his widow as executrix and trustee, "in trust for my infant son," "to provide for the care and maintenance and education of my son," and "to assign to him * * * such sum * * * as in her judgment may be of help to him in starting * * * his profession, and at the same time within the limits of her ability to relinquish from *her* estate." * * * *Held*, the widow trustee had a beneficial interest in the estate; that the testator made an absolute gift to her, simply "trusting" that she would carry out his expressed wishes. *Davies* v. *Davies*, 85 N. W. 201 (Mis., Feb., 1901).

"The result reached carries the doctrine of construction to a considerable length" (p. 203), but seems sound. It prevented partial intestacy; made provision for a wife with whom testator, a layman, was on the best of terms; and varied the literal meaning of "in trust" by considering the words "*her* estate" and other clauses in the will inconsistent with a strict legal construction of the words "in trust."

WILLS—CONTRACT TO MAKE A PARTICULAR WILL—SUIT BY BENEFICIARY—PART PERFORMANCE UNDER THE STATUTE OF FRAUDS. Plaintiffs sue the executors of A, their aunt, alleging that testatrix contracted to leave all her property to the plaintiffs. The contract proved was made orally with B and C, sisters of A. By its terms each of the three sisters was to leave all her property to the others, or if only one survived her, to that one. The last one to die was to make plaintiffs her heirs. B and C died, performing their part of the contract. A never made a will in favor of plaintiffs. *Held*, (HATCH and O'BRIEN, J.J., dissenting): (1) plaintiffs could not sue as beneficiaries; (2) contract was unenforceable owing to statute of frauds; (3) the statute relating to wills barred the action. *Everdell et al.* v. *Hill et al.*, 68 N. Y. Supp. (App. Div.) 719; Feb., 1901.

(1) The court refused to extend the doctrine of *Lawrence* v. *Fox*, 20 N. Y. 268 (1859), to a case where obligee of the contract was under no obligation to the beneficiary. In *Buchanan* v. *Tilden*, 158 N. Y. 109 (1899), the obligation was that of a husband to his wife. In *Healy* v. *Healy*, 55 App. Div. 315 (Nov., 1900), it was that of a father to his adopted

child. In both cases beneficiary recovered. HATCH and O'BRIEN, JJ., maintained that the narrow rule of *Lawrence* v. *Fox* does not restrict a court of equity, citing GRAY, J., in *Edson* v. *Parsons*, 155 N. Y., 555, 565 (1898), who clearly supports them. See also *Barrow* v. *Richard*, 8 Paige 351 (1840). (2) The majority of the court were right in saying there was here no sufficient part performance to permit the specific performance of the oral contract against A's estate in favor of the representatives of B and C had they sued. Motives of love and affection could explain the wills of B and C. No reference to a contract was necessary. See *Hale* v. *Hale*, 90 Va, 728 (1894). In *Parsell* v. *Stryker*, 41 N. Y. 480 (1869), possession of land was given; in *Healy* v. *Healy*, *supra*, a mother parted with her child. In both cases plaintiff recovered. [The last case is opposed to *Shahan* v, *Swan*, 48 Ohio St. 25 (1891), which seems preferable on principle.] (3) On the point that the statute relating to wills barred this action for specific performance, we are unable to concur with INGRAHAM, J. He seems to think that if A had once duly executed a will in favor of plaintiffs, according to the contract, plaintiffs could then have sued to prevent its revocation. The jurisdiction of equity in these cases is not to prevent revocation of a prior will and bring it to probate, it being duly executed under the statute as to wills, but to impress a trust on property actually bequeathed in breach of contract. *Bigelow on Wills* (Stud. Ser.), p. 110. In *Johnson* v. *Hubbell*, 2 Stock. Ch. 332 (N. J., 1855), 66 Am. Dec. 773 and note, there was no prior will. Since *Parsell* v. *Stryker*, *supra*, and *Shakespeare* v. *Markham*, 10 Hun, 311, 322 (1877), it seemed settled that only the statute of frauds need be complied with in cases of contracts to make a particular will. A prior will is of importance only as satisfying the statute of frauds *Brinker* v. *Brinker*, 7 Barr. 53 (Pa., 1847); 3 *Pars. Contr.* 406, n.; *contra*, *Hale* v. *Hale*, *supra; cf. Humphreys* v. *Green*, L. R. 10 Q. B. D. 148 (1882), where the existence of the contract is clearly made out by other evidence. *Rowan's Appeal*, 25 Penn. St. 292 (1855) *Edson* v. *Parsons*, *supra, semble.*